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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, EXECUTOR, and GRACE E. LANG, EXECUTRIX, of the Estate of JULIUS C. LANG, Deceased,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF AMICUS CURIAE.

J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
Attorneys.

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May It Please the Court:

I.

PURPOSE OF BRIEF OF AMICUS CURIAE

This brief is filed with the consent of Messrs. Wright, Jones & Bronson, Counsel for the executors. The Attorney General representing the Commissioner does not oppose the filing of this brief but wishes it to be stated that he believes that consideration of Louisiana law will not aid the Court for the reason that it is different from Washington law.

It is the belief of *amicus curiae* that the law of the State of Washington involved in this case is so similar to the law of Louisiana on the same subject that a

statement of the law of Louisiana will assist the Court in determination of the questions certified by the 9th Circuit Court of Appeals. Because of the similarity in the law it is submitted that a decison in this case should be applicable to Louisiana taxpayers similarly situated, and to this end this brief is respectfully submitted in an endeavor to place before the Court a concise statement of the relevant law of Louisiana.

II.

STATEMENT OF QUESTION

On March 18, 1938, the Circuit Court of Appeals for the Ninth Circuit certified to this Court the following questions of law upon which the said Circuit Court of Appeals for the Ninth Circuit desired instructions for a proper decision of this case. The questions certified are as follows, set out in the record and presented in petitioner's brief, page 3.

In its statement of the case, the Circuit Court of Appeals for the Ninth Circuit stated that this case involved seventeen policies of life insurance in fourteen of which his wife was named beneficiary and in three, his children. Fourteen of the policies were taken out by the decedent after his marriage to his wife in 1905. Three were taken out prior to his marriage. During his marriage, all premiums on these policies were paid with community funds. We will direct our argument principally to the question of the status of policies to named beneficiaries taken out during marriage when the premiums are paid with community funds.

III.

RELEVANT PROVISIONS OF FEDERAL STATUTE

This case arises under Section 302 (a) of the *Revenue Act of 1926* which provides as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * * *
>
> "(g) To the extent of the amounts receivable by the Executor of insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance taken out by decedent upon his own life."

The Commissioner of Internal Revenue determined a deficiency against the decedent's estate herein based upon his ruling that the entire proceeds of these insurance policies payable to named beneficiaries should be included in determining the amount taxable in the gross estate, thereby creating an excess over $40,000.00 in the total. This determination of the Commissioner was appealed to the Board of Tax Appeals which affirmed the Commissioner's finding in 34 B.T.A. 337. Appeal was then taken to the Court of Appeals for the Ninth Circuit.

IV.

ARGUMENT

A. *STATEMENT OF COMMUNITY PROPERTY LAW OF LOUISIANA*

This Court had occasion to review the community property law of Louisiana in the case of *Bender v. Pfaff*, 282 U. S. 127, holding in that case that the wife had a right to treat one-half of the community income as her income

for the purpose of the Federal income tax. In that case, this Court recognized that the Courts of Louisiana had unequivocally declared that the wife's half interest in the community property is not a mere expectancy during marriage, but that the wife has a present vested interest in community property equal to that of her husband. *Phillips v. Phillips*, 160 La. 813; Louisiana Revised Civil Code, Articles 915, 2334, 2399, 2402, 2404; *Succession of Marsal*, 118 La. 212; *Succession of May*, 120 La. 692; *Beck vs. Natalie Oil Co.*, 143 La. 154; *Niedman vs. Fontenot*, 275 Fed. 688; *Warburton vs. White*, 176 U. S. 484; *Arnett vs. Reade*, 220 U. S. 311; *Dixon vs. Dixon Executors*, 4 La. 188; *Theall vs. Theall*, 7 La. 226; *Bek vs. Miller*, 8 Fed. (2d) 797; *Ricker vs. Blair*, 32 Fed. (2d) 222; *McLarry vs. Commissioner*, 30 Fed. (2d) 789; Baudry-Lacantinerie Vol. 15, Section 247; Planiol & Ripert, Traite Pratique de Droit Civil Francaise 1925, Vol. 8, Sections 156 to 158, 516.

In that case, it was also recognized by this Court that in Louisiana a husband has power to dispose by testamentary disposition of only his one-half of the community property. See R.C.C. 515; *Theall vs. Theall, supra*; *Ramsey vs. Beck*, 151 La. 190. Also it was recognized that the wife may dispose of her one-half of the community by testamentary disposition and the husband is powerless to prevent it. See Civil Code Articles 915 and 916; *Succession of Haynes*, 33 La. Ann. 1143; *Succession of Moore*, 40 La. Ann. 531. Further that if the husband prove to be a bad manager or becomes involved in financial difficulties, the wife may bring about an immediate dissolution and liquidation of the community. *Wolf & Clark v. Lowry*, 10 La. Ann. 272; *Webb v. Bell*, 24 La. Ann. 75; *Brown & Learned v. Smythe*, 40 La. Ann. 325. Further that when she sues for separation or divorce, a wife is entitled to a strict accounting from the husband for the communtiy property and to reimbursement and retribution for any acts done

by him in fraud of her rights. *Hill vs. Hill,* 115 La. 489; *White vs. White,* 159 La. 1055.

It has been repeatedly held by the Supreme Court of Louisiana that if the husband uses community income to improve his separate estate or to pay his separate debts, his separate estate becomes the community's debtor to that extent. See in this connection Article 2404 of the Civil Code; *Glenn vs. Elam,* 3 La. Ann. 611 *Dillon vs. Freyville,* 129 La. 1005; *Succession of Casey,* 130 La. 743; *Succession of Goll,* 156, La. 910; *Childers vs. Johnson,* 6 La. Ann. 634.

Policies taken out Prior to Effective Date of the Revenue Act of 1918 are Not Taxable at all.

B. *THE STATUS OF LIFE INSURANCE TAKEN OUT DURING COMMUNITY IN LOUISIANA*

The general rule in Louisiana is that all property acquired during marriage, with the exception of donations made to individual spouses, the wife's action for damages for personal injuries and the separate earnings of the wife, are community property. *Civil Code Art. 2402,* provides as follows:

> "Property forming community—Personal injuries to wife.—**This** partnership or **community consists** of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and **of the estate which they may acquire during the marriage,** either by donations made jointly to them both, or **by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both,** because in that case the period of time when

> the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; 'provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws'." (Emphasis ours).

There is a very strong presumption that all property **acquired during** marriage is community property. *Schwab v. Hava*, 154 La. 922, 98 So. 420; *Garlic v. Dalby*, 147 La. 18, 84 So. 411; *Barnes v. Thompson*, 154 La. 1036, 98 So. 657; *Ramsey v. Beck*, 151 La. 190, 91 So. 674; *Schoeffner v. Schoeffner*, 163 La. 142, 111 So. 655; *Guaranty Bank & Trust Company v. Hunter*, 173 La. 497, 137 So. 904; *Busby v. Busby*, 168 La. 510, 122 So. 599. The time of acquisition is a determining factor.

Thus, land purchased by a husband prior to his marriage is his separate property, and if he pays part of the purchase price with community funds after marriage his separate estate is indebted to the marital partnership for such payments. *Civil Code Article* 2408. Compare *Succession of Rouss*, 144 La. 143, 80 So. 229. Likewise, property acquired by husband after marriage is community property, the time of purchase determining the status. *Jefferson v. Stringfellow*, 148 La. 223, 86 So. 774. So even where the husband purchases land with his separate funds the land becomes community property unless there is a specific recital in the act of purchase stating that separate funds were used. *Ramsey v. Beck*, 151 La. 190. Even though it is clearly shown in the case of an acquisition by a husband that the money used was his separate and paraphernal property, the land acquired

will be community property in the absence of a specific recital in the deed, the presumption being conclusive. *Schoeffner v. Schoeffner, supra.* In the case of an acquisition of land by a married woman, if there is no recital in the deed that separate funds are used, the presumption that the property is community can only be rebutted by evidence of the clearest character that the funds used were entirely the wife's separate property. *Succession of Manning,* 150 La. 1008, 91 So. 435. So also property acquired during marriage by prescription becomes community property. *Crouch v. Richardson,* 158 La. 822, 104 So. 729. See also *Succession of Watkins,* 156 La. 1000, 101 So. 395. Even personal clothing bought by the wife belongs to the community. *Munch v. Central Laundry Company, Ltd.,* 2 La. App. 123. The same rule applies to a business and all its assets, including accounts receivable, etc. *Barnes v. Thompson,* 154 La. 1036, so, likewise, rents collected from separate property fall into the community. *Peters v. Klein,* 161 La. 664, 109 So. 349. In the same manner, the servitude of mineral rights reserved in a conveyance fall into the community. *Sample v. Whitaker,* 172 La. 722, 135 So. 38.

Since there is a very strong presumption that all property rights and assets of any character acquired during the community become community property, which presumption can in no case be rebutted except (in some cases) by showing that the property in question was acquired with separate funds it would be natural to suppose that insurance policies taken out during marriage and paid for with community funds would also be considered community property. **This is precisely the case** and it was squarely so held in the *Succession of LeBlanc,* 142 La. 27, 76 So. 223. In that case the Supreme Court of Louisiana said:

> "The status of the proceeds or avails of such life insurance—that is, whether it is community property or property of the separate estate of the insured—depends on whether the contract or insurance was made during the marital community or when the insured was single. The status of the proceeds or avails of such insurance, whether community property or the separate property of the insured, is not governed by the marital status of the insured at the time of his death."

See also in this connection *Succession of Buddig,* 108 La. 406, 32 So. 361, where it was specifically held that a policy of life insurance issued to a married man during the existence of the community falls into the community and not his separate estate, the Court saying in this case:

> "He (the husband) has no right to transact so as to build up a separate estate to the disadvantage of the community. As to him primarily all the property belongs to the community".

See also *Succession of Verneuille,* 120 La. 605, 45 So. 520. In this case the policies were taken out by the husband prior to his marriage and it was held that the proceeds belonged to his separate estate, the Court saying:

> "The date of the right is the date of the policy and from that time on it remains the property of the insured * * * ".

Referring, however, to the question of whether the community was entitled to reimbursement for premiums paid with community funds, the Court said:

> "The community is unquestionably entitled to the amount. The separate estate cannot be benefited by payments for its benefit and not be indebted for them".

The case of *Succession of Jones*, 185 La. 377, is also directly in point involving war risk insurance.

The bar of Louisiana is amazed by the interpretation given Louisiana law by Texas Judge Hutcheson and concurred in by Florida Judge Brian, with Georgia Judge Sibley dissenting, in *Newman v. Commissioner of Internal Revenue*, 76 Fed. 2nd 449. This case involves the same point now before this Court. We call the Court's attention to the able dissenting opinion of Judge Sibley in this case, which for convenience we have set out in full in an appendix hereto.

Before considering the opinion in that case we wish to eliminate confusion by pointing out that by particular statute (Act 189 of 1914 and Act 88 of 1916) it is provided in Louisiana that the proceeds of insurance, however payable, are exempt from seizure by creditors (see *Succession of Irwin*, 169 La. 877, 126 So. 223), and that such proceeds are not for Louisiana inheritance tax purposes considered part of the estate of the decedent. *Succession of Hedden*, 146 So. 732. Nor do the Inheritance Tax laws of Louisiana tax the right of the decedent to change the beneficiary as do, in practical effect, the Federal Estate Tax laws. Compare in this connection *Chase National Bank v. the United States*, 278 U. S. 327, 73 L. Ed. 405. Louisiana law simply regards insurance policies as third party beneficiary contracts or contracts *pour autrui*.

Also we would like to define our terms. The "beneficiary", to whom the policy is payable, the "insured", whose life is insured, the "owner" of the policy, who is the person or persons who either originally "takes out" the policy or presently controls the right to surrender the policy or to change the beneficiary, and the "insuror," the company carrying the insurance, each have separate interests. Note particularly that the **benefi-**

ciary and the **owner** represent different interests which are separate although both separate interests may be in one person wholly or in part. Thus, in the case of a policy taken out by a partnership or a marital community on the life of one partner, payable to the other, one partner has both a beneficial interest and an ownership interest, while the other is both an owner and the insured.

Referring to Judge Hutcheson's opinion in *Newman v. the Commissioner, supra,* we agree that the tax here is not on the proceeds but upon the ownership right of disposition and control. The question passed over by Judge Hutcheson is who has this right of disposition or control, which is the subject of the tax. This right of disposition was acquired during the community and with community funds. True, it is nominally exercised by the husband, but so are all other rights with respect to community property, since the husband is specifically made the head and master of the community. *Civil Code Art.* 2403. Under the reasoning of Judge Hutcheson, all property comprising the community should be included in the husband's estate. There is no warrant for assuming that the husband has any greater rights or greater freedom with respect to his exercise of the right to change the beneficiary than he has with respect to any other community property. He is subject to the same limitations pointed out above. We have shown above that the presumption that all property acquired during community is community property specifically applies to insurance policies. *Succession of Buddig, supra; Succession of Verneuille, supra; Succession of LeBlanc, supra; Succession of Jones, supra.* It is plain, therefore, that this reserved "ownership right of disposition or control" is a community right.

If this were not so, the husband could defraud the

wife of all her interest in the community property by simply taking out paid up policies, using for this purpose all the community funds, naming her as beneficiary and then changing the beneficiary to some third party, or else simply cashing in the policy. If this ownership right to change the beneficiary and control the policy is the separate property of the husband the wife would have no recourse against such action on the part of the husband.

In the event the husband changed the name of the beneficiary of the policy from his wife to his executors, then if the policy were taken out during the community there is no question but that the policy and all its rights would be community property. *Suc. of Jones, supra; Succession of LeBlanc, supra.* If he then again changed the name of the beneficiary to his wife or a third party, would this exercise of this right change the **nature of the right itself** from community property to **his separate property?** It is submitted that it is inconceivable that the husband could thus transfer **community property** to **his separate estate** without any action on the part of the wife.

Judge Hutcheson rightly points out that policies payable to the wife are regarded as gifts to the wife by Louisiana law. *Succession of DeForges,* 135 La. 49, 64 So. 970. This, however, is entirely beside the point, since it is simply a gift of the beneficiary interest with which we have no concern here. If it were a completed and irrevocable gift then it certainly would not be taxable at all. Compare *Chase National Bank v. United States,* 278 U. S. 327, 73 L. E. 405. It is not, however, a completed and irrevocable gift under Louisiana law where the right to change beneficiary is reserved. *Douglass v. Equitable Life Assurance Society,* 150 La. 519, 94 So. 834. We are here dealing only with the right of disposition or incidents of ownership, which are by hypothesis not given to the wife.

In order to consider this right of disposition as the separate property of the husband and taxable in full to him, it is necessary to be inconsistent with the Louisiana Civil Code articles and all those decisions of the Supreme Court of Louisiana, which uniformly decree that **all assets acquired during marriage with community funds are community property.**

Referring to the specific words of the Revenue Act in question we see that the only insurance included is that "taken out by decedent upon his own life". We have seen *supra* that property acquired in the name of either spouse during community regime is not acquired **by** the particular spouse but is acquired **by** the marital partnership. In Louisiana an insurance policy on the life of the husband payable to the wife and paid for with community funds is not **taken out** by the husband but **is taken out by the community.** It therefore seems highly doubtful whether such policies are within the taxing statute at all, and certainly not more than an undivided one-half could be considered to be taken out by the decedent and as such includable in his estate.

It is submitted that there is no distinction in this respect between the question here presented and the case of a partnership where one partner takes out, on behalf of the partnership, insurance on his own life, payable to the partnership or one of the other partners. In such a case it has been determined that such insurance is not includable in the estate of the deceased partner. See *Scovell v. Commissioner,* 30 B.T.A. 679. Compare also the case of insurance taken out by an officer of a corporation on his own life for the benefit of the corporation. *Wilson v. Crooks,* 52 Fed. 2nd. 692.

The precise question here involved was before the Board of Tax Appeals in Estate of *Louisa Morris Carrol*

v. the Commissioner, 29 B.T.A. 11. In this case the husband took out four policies payable to **his** executors. The wife died before the husband and the question was whether one-half the cash surrender value of the policies should be included in the estate of the wife. Note that this case also involved "ownership" rights rather than beneficiary rights. In this case the Commissioner successfully contended that insurance taken out during the community was community property and the Board of Tax Appeals held that one-half the cash surrender value was includable in her estate.

Judge Hutcheson's decision leads to the ludicrous result that where the husband makes the policy payable to **his** estate, only one half is actually included in his estate; but where he makes it payable to **his wife,** the full amount is included in his estate. Judge Hutcheson reaches this astonishing result, on the ground that the Louisiana law considers the latter policy a gift to the wife. **Summarized —if he gives it to his wife, it is all his; if he gives it to himself his wife gets half.**

It is submitted, therefore, that the opinion in *Newman v. Commissioner, supra,* does not meet the point involved, which is the status of the right of disposition, the subject of the tax. It is further submitted that a careful consideration of Louisiana law leads to the inevitable conclusion that this right so taxed is a community right in which the husband has only an undivided one-half interest.

Indeed, the departmental regulations, Art. 25, Regulations 70, provided that the payment of premiums was the measure of the amount of insurance to be included in decedent's estate; that is to say, insurance was includable only in the proportion that the premiums paid by decedent bore to the total premiums paid. These regulations were in force and acted upon for many years. during

which time the act in question and the particular section in question was re-enacted by Congress without material change. It is submitted that this contemporaneous administration construction, together with the reenactment of the act of Congress in substantially the same language in view of such administrative construction, constituting a legislature adoption of such construction, should be followed by the Courts. We respectfully refer the Court in this connection to the case of *Walker v. The United States*, 83 Fed. 2nd. 103 involving the precise question.

We wish to point out finally that the position urged by us is the one which is consistent with the purpose and intent of Congress in enacting Section 302 (g) of the Revenue Act, which was to prevent the diminution of the decedent's taxable estate through the purchase of insurance policies. Since one-half of the money used to pay premiums was from the wife's one-half of the community, and such one-half of such monies would not in any event have been included in the decedent's taxable estate, our position that the tax should be based on only one-half of the proceeds of the policies is in accordance with the intent of Congress.

We submit that a very serious constitutional question is raised by the present Regulations and by the decision in the *Newman* case, since the tax will be based in part on property which never at any time formed part of decedent's estate. It is submitted that this is beyond the reasonable and constitutional limitations of an estate tax. *Cf.. Heiner v. Donnan*, 285 U. S. 312; *Schlesinger v. Wisconsin*, 270 U. S. 230. An estate tax on one man, measured by another man's property, is the net result of the Regulations and the *Newman* case. A tax on the incidents of ownership in this case, if the *Newman* case is followed, would not be a genuine tax on a substitute for testamen-

tary disposition, which is and must be the dominant purpose of the provision of Section 302(g). *Cf. U. S. v. Wells,* 283 U. S. 102.

C. IF INSURANCE IS TAXABLE IN FULL TO HUSBAND, HUSBAND'S ESTATE IS INDEBTED TO COMMUNITY FOR THE PREMIUMS

This proposition seems self-evident. Assuming that the right of disposition is entirely in the husband, if he purchased this right for his separate estate with community funds, his estate surely must be indebted to the community for the community funds which he used to thus enrichen his separate estate. This point was squarely passed upon in *Succession of Buddig, supra,* and *Succession of Verneuille, supra,* (see quotation page ——, *supra*) and *Estate of Moreman,* 38 La. Ann. 219. This is the specific provision of Civil Code **Art. 2408.** It has been repeatedly held that the separate estate of one spouse cannot be enriched at the expense of the community. See *Kelly v. Robertson,* 10 La. Ann. 303; *Whiteman v. LeBlanc,* 28 La. Ann. 430; *Domunguez v. Lee,* 17 La. 295; *Peters v. Klein, supra, Succession of Webre,* 49 Ann. 1491, 22 So. 930; *Succession of Burke,* 107 La. 82, 31 So. 391; *Succession of Goll,* 156 La. 910, 101 So. 263; *Kendall v. Kendall,* 174 La. 148, 140 So. 6.

In *Newman v. the Commissioner,* Judge Hutcheson holds that there is no such claim since a policy payable to the wife is under Louisiana law considered a gift by the husband to the wife. It is submitted that this again begs the question. If it were a completed and irrevocable gift there would be no tax as shown *supra.* We are dealing only with the right to change the beneficiary and we are assuming here that this right is exclusively in the husband. To support the gift theory it would be necessary for Judge

Hutcheson to hold that the wife had made a gift of her one-half of the community funds used for the premiums to the husband to give him this exclusive right. Such a holding is impossible under Louisiana law, since none of the legal requirements for a gift have been complied with. Under Louisiana law a gift can be either by notarial act or can be a manual gift. In the case of a manual gift an actual physical delivery is necessary and, strict proof of this is required. See *Civil Code Articles* 1536 through 1540. There is no showing that the wife made any such manual delivery of the funds, and in fact she did not do so.

The precise question of contributions for premiums where the wife is the named beneficiary has never arisen in Louisiana because (1) under Louisiana law the right reserved to change the beneficiary would be considered community property, and (2) because under the law of Louisiana the right to change the benficiary is not subject to Louisiana inheritance taxes. However, it is clearly established that the community is entitled to reimbursement of funds used to pay premiums on policies taken out by a husband prior to his marriage. See *Succession of Buddig, supra.*

CONCLUSION

It is submitted, in conclusion, that under the law of Louisiana, where insurance policies are taken out in the name of a husband during marriage, where the premiums are paid with community funds, where the wife is named as beneficiary and where the right to change the beneficiary is reserved, the reserved ownership right in the policy is community property, just as any other asset acquired during marriage with community funds. It is

further submitted that the precise questions involved are not met in the opinion of *Newman v. the Commissioner*, 76 Fed. 2nd, 449, and that the decision in that case should be reversed and the dissenting opinion of Judge Sibley in that case made the rule by this Court. It is further submitted that the first question certified by the Circuit Court of Appeals for the Ninth Circuit should be answered by holding that only one-half of the insurance should be deemed "taken out by the husband" and only one half of the proceeds included in his estate.

Respectfully submitted,

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Attorneys for Respondent.

APPENDIX

Dissenting opinion of Judge Sibley in *Newman v. Commissioner*, 76 Fed. (2nd) 449:

"I believe in the reality of the wife's interest in the Louisiana marital community, and I believe in the iniquity of taxing a decedent's estate with respect to wealth which he never owned. This creed compels me to dissent. The Louisiana Code speaks of the community always as a partnership, the husband being its manager. Arts 2399, 2402, 2403, 2404, 2406, 2409, 2410, 2411. Though the husband has large powers, they are not absolute. Art. 2404. And the wife's interest is not a mere expectancy but a present vested title. *Phillips vs. Phillips*, 160 La. 813, 107 So. 584. 'In Louisiana the wife has a present vested interest in community property equal to that of the husband.' *Bender vs. Pfaff*, 282 U. S. 127, 51 S. Ct. 64, 65, 75 L. Ed. 252, affirming (D. C.) 38 F. 2d) 642, *Id.* (C. C. A.) 38 Fed. (2d) 649. The federal estate tax law here involved, Rev. Act of 1926, §302, 26 U. S. C. A. §1094, after dealing with the case of insurance payable to the estate, directs the inclusion in the estate, for measuring the tax imposed upon its devolution, of 'the excess over $40,000 * * * receivable by all other beneficiaries as insurance under policies *taken out by the decedent upon his own life.*' Regulation 70, Art. 25, construes the words 'taken out by the decedent' thus: 'Insurance shall be deemed to be taken out by the decedent in all cases where he *pays all the premiums* either directly or indirectly, whether or not he makes the application. On the other hand the insurance is not deemed to be taken out by the decedent even though the application is made by him where *all the premiums are actually paid by the beneficiary.* Where a *portion of the premiums were paid* by the beneficiary and the remaining

portion by the decedent, the insurance will be deemed to have been taken out by the latter *in the proportion that the premiums paid by him* bear to the total premiums paid.' (Italics added). The suggestion that the Regulation is opposed to the statute is not sustainable. The words 'taken out by the decedent' are ambiguous and may refer in a narrow sense to the act of applying for the insurance; or they may have a broader reference to the whole course of the insurance and to its economic source. The Secretary in making the interpretative regulation has from the beginning rejected the making of the application as the important thing. Such a construction could lead to great absurdity and injustice. The construction adopted and consistently adhered to is that the Congress, seeking to measure the death tax by the value of the decedent's estate and to abort all effort to avoid the tax by antecedent dispositions made in contemplation of death or ripened by death, must have meant that insurance on the decedent's life paid for by the decedent in whole or in part, no matter who made the application, was taken out by him to the extent that he paid for it.* The repeated reenactment of the same statutory words strongly indicates legislative approval and adoption of the executive construction. *Brewster vs. Gage*, 280 U. S. 327, 328, 337, 50 S. Ct. 115, 74 L. Ed. 457; *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U. S. 269, 53 S. Ct. 337, 77 L. Ed. 739; *Burnett v. Brooks*, 288 U. S. 378, 379, 53 S. Ct. 457, 77 L. Ed. 844, 86 A.L.R. 747. Taking the Regulation therefore at its face value, who applied for the insurance is immaterial; the question is who paid the premiums which created it? The thought is that although the insurance is to go to the appointed beneficiary and the federal

*Art. 32 of the Regulations under the Revenue Act of 1918 is quoted in Thurber, Federal Estate Taxes (1921) § 77. The identical words of that statute are re-enacted in Revenue Acts of 1921, § 402 (f) 1924 § 302 (g) and 1926 § 302 (g). 42 Stats. p. 279. 43 Stats. p. 305 (26 USCA § 1094 note). 44 Stats. p. 71 (26 USCA § 1094 (g).

law does not seek to interfere with that, still the insurance contract represents an investment of the premiums, and so far as the decedent thus invested his money which would otherwise have been a part of his estate, that far the disposition, especially when he reserves the right to change the beneficiary, may be considered both as in contemplation of death and as incomplete until death and justly to be included in measuring his estate tax. It is wholly a question of federal law. The law of Louisiana as to who gets the insurance and what account if any is due to the community estate where the premiums are paid out of it is wholly immaterial. The federal statute asks but one question, Whose money paid the premiums? In this case there can be but one answer. It was money which belonged equally to the husband and wife. Both equally paid the premiums. The husband paid only half. Only half of the resulting investment is to be included in measuring this tax.

"The decisions cited in the prevailing opinion touching estates by the entirety do not help its argument, for as stated in *Tyler vs. United States*, 281 U. S. 497 at pages 500, 501, 505, 50 S. Ct. 356, 358, 74 L. Ed. 991, 69 A.L.R. 758, the statute expressly included such estates but also expressly excepted 'such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent'; and as to the estate held to be taxable it is said: 'None of the property constituting it had, prior to its creation, ever belonged to the surviving spouse.' Here half of the original investment did belong to the surviving spouse, and the applicable statute rightly interpreted excepts her half. This interpretation is supported by its consistency with the provision regarding estates by the entirety. I think only half of this insurance represents an investment of funds of the decedent and only half ought to be included in measuring his estate tax."

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CORRECTIONS TO BRIEF IN AMICUS CURIAE.

May It Please the Court:

Because of the haste with which it was necessary to prepare the brief of *amicus curiae* heretofore filed, cer-

tain errors have crept into the final brief, and we respectfully submit the following corrections:

(1) Page 2, Part II, line 2, eliminate the words "the following".

(2) Line 6 of the same page and paragraph eliminate "as follows,".

(3) Page 5, Eliminate dark printing reading as follows:

> "Policies taken out prior to effective date of Revenue Act of 1918 are not taxable at all."

(4) Page 9, line 17, after the word "proceeds", insert "when payable to named beneficiaries."

(5) Page 9, line 19, after period, insert "compare *Succession of Hedden,* 140 So. 851, and *Succession of Hedden,* 146 So. 732."

(6) Page 15, line 8 of paragraph C, in blank insert the figure "8".

(7) Page 17, last line, substitute the words "Attorneys for *Amicus Curiae*" for the words "Attorneys for Respondent."

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
Attorneys for Amicus Curiae.